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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KAREN THOMPSON,

Plaintiff and Respondent,

v.

NAMALE WEST, INC., et al.,

Defendants and Appellants.

D051865

(Super. Ct. No. 37-2007-00066481-
CU-PO-CTL)

APPEAL from an order of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Affirmed.

Namale West, Inc., Anthony Robbins & Associates, Inc. and The Anthony Roberts Foundation, Inc. (collectively Defendants) appeal from an order denying their motion to compel Karen Thompson to arbitrate her claims against them under an arbitration clause contained in a registration form signed by her traveling companion. Defendants claim the trial court erred in denying their motion because Thompson's companion had the authority to agree to the provision as her agent. Alternatively, they claim that Thompson

was bound by the provision as a third party beneficiary to the agreement. We reject Defendants' arguments and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants are the alleged operators of a luxury resort located in the Republic of the Fiji Islands. In May 2005, Alexander Sadas invited Thompson to travel with him as his guest to the resort and paid for the entire vacation. When they arrived at the resort, Sadas filled out and signed a guest registration form seeking personal information about himself and Thompson. Below the signature line, the form stated: "I accept the terms of [the resort] as specified on the reverse of this form." The back of the form stated that Fiji law applied and included a provision that "any legal dispute arising under the contract shall be settled by binding arbitration in Fiji or another mutually acceptable jurisdiction." Thompson, however, never saw or signed the guest registration form and did not give Sadas any authority to bind her contractually.

Thompson and Sadas decided to go horseback riding, an activity provided by the resort. During the ride, Thompson was thrown from her horse and trampled. In May 2007, she filed the instant action against Defendants alleging a single negligence cause of action. Defendants petitioned to compel arbitration or, alternatively, to stay or dismiss the action based on forum non conveniens. The trial court denied the petition to compel arbitration, finding that Defendants failed to show that the agreement was valid and binding as to Thompson. It also denied Defendants' request to dismiss the action because they failed to prove that California was a seriously inconvenient forum. Defendants timely appealed. Defendants do not challenge the trial court's denial of their request to

dismiss the action based on forum non conveniens; accordingly, we limit our discussion to the petition to compel arbitration.

DISCUSSION

At the outset, we note that the parties have not raised the issue of whether California law applies to an accident that occurred in Fiji where the parties executed the contract in Fiji and the contract states it is governed by Fiji law. The parties and the trial court have assumed that California law applies and we proceed on that basis.

A. General Legal Principles and Standard of Review

A petition to compel arbitration is a suit in equity seeking specific performance of that contractual provision. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The party petitioning to compel arbitration "bears the burden of proving the existence of a valid arbitration agreement by [a] preponderance of the evidence" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972) and that the claims fall within the scope of that agreement. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739.)

A threshold issue in every proceeding to compel arbitration is whether there is a valid agreement to arbitrate. (*Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 824-825.) "A party can be compelled to arbitration only when he or she has agreed in writing to do so." (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 245.) Nonetheless, a nonsignatory to an arbitration agreement can be required to arbitrate claims where the nonsignatory was a third party

beneficiary of the arbitration agreement or because of an agency relationship between the party signing the agreement and the nonsignatory. (*Id.* at p. 242.)

Whether or not an arbitration agreement is operative against a person who has not signed it involves a question of "substantive arbitrability," which is to be determined by the court. (*Unimart v. Superior Court* (1969) 1 Cal.App.3d 1039, 1045.) When, as here, there is no conflicting extrinsic evidence, we independently review the denial of a motion to compel arbitration. (*Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214.)

B. Agency Theory

Defendants contend that Thompson is bound by the arbitration provision in the registration form because Salas signed the form as her agent. We disagree.

It is presumed that a person is acting for herself or himself and not as the agent of another (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780 (*Inglewood Teachers*)) and a person cannot become the agent of another merely by representing himself or herself as such. (*Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301.) Words or conduct by both principal and agent are necessary to create the relationship. (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 588 (*Flores*).) Generally, the existence of an agency relationship presents a question of fact, with the burden of proving agency resting upon the party asserting the existence of the agency. (*Inglewood Teachers, supra*, 227 Cal.App.3d at p. 780.)

Because Defendants presented no evidence showing a written or oral agency relationship between Sadas and Thompson, they must show that Sadas was acting as Thompson's ostensible agent. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) However, a principal is bound by acts of his ostensible agent "to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." (Civ. Code, § 2334.) Accordingly, the doctrine of ostensible authority is merely a specific application of the more general doctrine of estoppel. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 451.)

Defendants, however, failed to meet their burden of showing that Sadas was Thompson's ostensible agent. The registration form did not suggest an agency relationship as it required only one signature to indicate *that* person's consent to the terms and conditions on the reverse of the form. Moreover, Thompson had no knowledge that the registration form contained an arbitration provision and her inaction while Sadas filled out the registration form could not have reasonably led Defendants to believe that Sadas was empowered to waive her constitutional right to a jury trial. Even assuming Defendants justifiably relied on Thompson's silence while Sadas filled out the registration form, they presented no evidence showing a change in position or injury resulting from such reliance.

The federal authorities cited by Defendants for the first time in their reply brief are inapposite. (See *Marek v. Marpan Two, Inc.* (3rd Cir. 1987) 817 F.2d 242; *DeCarlo v.*

Italian Line (D.C.N.Y. 1976) 416 F.Supp. 1136.) These cases addressed whether, under maritime law, a cruise ship ticket sufficiently called the passenger's attention to the terms and conditions inside a ticket folder setting forth a particular statute of limitations period. (*Marek*, at pp. 243-245; *DeCarlo*, at pp. 1136-1137.) In *Marek*, the court noted it was irrelevant that the injured party shared one ticket folder with her traveling companion because both passengers had access to the folder and each glanced at the provisions contained therein. (*Marek*, at p. 247; accord *DeCarlo*, at p. 1137 [plaintiff charged with notice of the provision because her "agent" had the ticket both before and after the voyage].) We have found no authority extending this concept to the waiver of the constitutional right to a jury trial.

Accordingly, because Sadas did not have the authority to bind Thompson to the provision, the trial court did not err when it denied Defendants' petition to compel arbitration.

C. Third Party Beneficiary Theory

Defendants assert that Thompson was an intended third party beneficiary to the terms and conditions of the registration form because she sought and accepted the benefits afforded to registered guests at the resort and her acceptance of these benefits necessarily entailed acceptance of the arbitration provision. As a preliminary matter, we note that Defendants waived this argument by not raising it below. (*Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, 561.) Nonetheless, we exercise our discretion to address the issue because Thompson did not object to this new theory and argued its merits.

Defendants rely on *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64 (*NORCAL*) and *Harris v. Superior Court* (1986) 188 Cal.App.3d 475 (*Harris*) to support their assertion that Thompson was a third party beneficiary to the terms and conditions listed on the registration form. These cases, however, addressed situations where a nonsignatory that benefited from a contract could not avoid application of an arbitration clause contained in the contract.

For example, in *Harris*, a doctor was bound by an arbitration agreement that a health plan subscriber had entered into with the doctor's employer because the doctor obtained patients through this contract. (*Harris, supra*, 188 Cal.App.3d at pp. 478-479.) Similarly, in *NORCAL*, a spouse who accepted a defense and demanded a settlement from her husband's medical malpractice insurer was bound by the policy's arbitration provision. (*NORCAL, supra*, 84 Cal.App.4th at pp. 81-84; see also, Civ. Code, § 3521 [he who takes the benefit must bear the burden].)

As another court noted, "[t]he point of *NORCAL* is that a person is not entitled to make use of a contract as long as it works to his advantage, then attempt to avoid its application in defining the forum in which his dispute should be resolved." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991.) Critically, "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, *so far as the facts are known, or ought to be known, to the person accepting.*" (Civ. Code, § 1589, italics added.)

We fail to see how Thompson could accept the "benefits" of contractual terms that she did not even know existed. Moreover, Thompson's claim against Defendants does

not rely on, make reference to or seek the benefit of anything on the guest registration form. (Compare, *NORCAL*, *supra*, 84 Cal.App.4th at pp. 81-84; *Harris*, *supra*, 188 Cal.App.3d at p. 479.) Finally, Defendants presented no evidence showing that acceptance of the "terms and conditions" listed on the form was a prerequisite to any guest staying at the resort. Accordingly, we reject their argument that Thompson's fully paid stay at the resort amounted to the acceptance of the terms and conditions listed on the form.

DISPOSITION

The order is affirmed. Thompson is entitled to her costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.